93-970

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JOSEPH P. DICICCO,

Petitioner,

vs.

ROBERT P. TREMBLAY,

Respondent.

Petition for a Writ of Certiorari to the Maine Supreme Judicial Court, Sitting as the Law Court for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Law Court was informed, in detail, that both attorneys and judge, at the post-trial hearing, suppressed the new evidence on fraud (placement of misnomer). The suppression included fatal delay of notice to hearing, denial to testify to petitioner and witness, and attorney's summation of evidence not handed in. Request for help denied.

Judge claimed misnomer caused latent ambiguity that legally allowed choice of boundary that contradicted deeds and parole evidence, and turned petitioner from alleged owner to trespasser.

The record shows that case objective was achieved, that confirmed petitioner's deed, but was dismissed for contradicting reason. Law Court removed the contradiction with suggestion of credibility of a witness, but record shows opposite indication.

The location of the north border of Richardson on the only survey map used, respondent's exhibit #1, makes claim of latent ambiguity a physical impossibility. The Law Court erases the north border from the exhibit.

1. If state court procedures are so designed as to make the appellate and the lower courts so dependent that an appellate court will even erase evidence from the record,(just one example) in order to accommodate the lower court, then will this not only deprive this out-of-state petitioner his right to a fair trial, repugnant to the Fourteenth Amendment of the Constitution of the United States, but will it not also have its effect upon a fluid and progressive society that the United States must be?

2. Is the validation of state trespass statute Title 14 M.R.S.A. § 7552, as applied, depriving the petitioner of rightful belief in ownership, right to protect property, and right to an amount of money that is life threatening, repugnant to the Fourteenth Amendment of the Constitution of the United States, by substituting an alien boundary and *then* bestowing latent ambiguity, along with other ambiguities, while not passing on the fact that the deed functions perfectly without the alien boundary?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Joseph P. DiCicco respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Judicial Court, Sitting as the Law Court for the First Circuit, entered in the above-entitled proceeding on July 14, 1992.

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court, Sitting as the Law Court for the First Circuit, affirming the judgment from below, is not yet reported but is reprinted hereto (1a-9a).[1]

1. References to the Appendix to this Petition are referred to herein as "__a".

The judgment of Superior Court, in Machias, Maine, is reprinted hereto (11a-14a).

STATEMENT OF JURISDICTION

On petitioner's appeals, the First Circuit on July 14, 1993, entered a judgment affirming the judgment of Superior Court, Machias, Maine, on May 27, 1992.

On November 5, 1993, Justice Souter ordered that the time for filing this petition for writ of certiorari be extended to and including December 18, 1993.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Section 1, Amendment 14, of the United States Constitution provides in pertinent part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law;

State Trespass Statute: Title 14 M.R.S.A. § 7552 is printed hereto at 6a.

STATEMENT OF THE CASE

A. The Federal Questions

The first Question Presented in this petition, is being raised in

the petition itself, as it could not be raised in any other way.[2] The petitioner asked the Law Court, why neighbor Richardson's north border was erased from the exhibit. The response was an issuance of the mandate, forthwith, cancelling any previous opportunity to raise the federal question before this petition.

The north border, before the erasure (10a), made the claimed latent ambiguity a physical impossibility because the misnomer, supposed to have caused the latent ambiguity is seen to be not on the properties in question. But after the erasure (9a), the misnomer is placed onto the property. *See* page 8 for more explanation of the north border.

After the trial, the newly discovered evidence of fraud was properly written up in the Amendment to the Motion for New Trial, which alleged that the respondent had written up his own deed, and perpetuated into the deed, a misnomer that he had been told to get rid of. The trial judge had claimed that the misnomer caused a latent ambiguity that affected the deeds of both litigants.

The judge was then legally empowered to set aside the deeds and parole evidence and choose a boundary on his own discretion. The boundary that the judge chose, turned the petitioner to a trespasser.

At the post-trial hearing, the judge offered both attorneys the opportunity to hand in after the hearing a brief to argue the "wilful" aspect of the trespass. The petitioner's attorney did not hand in a

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2. A federal question may be raised in the petition when the highest state court, in a "surprise" decision (such as erasure of a boundary line in order to affirm), wherein the federal issue is born, declines to entertain a petition for rehearing and the federal question can be raised in no other way than through the papers addressed to the Supreme Court. *Saunders v. Shaw,* 244 U.S. 317, 320 (1917).

brief. An order (15a) was *then* issued of wilful trespass based on respondent's brief. The petitioner went *pro se* and wrote the following federal question, at the first opportunity, in response to the wilful trespass order, in his own behalf:

> Therefore the Appellant respectfully requests of the Law Court that the Court make a decision upon the objection of the Appellant to the use of Title 14 M.R.S.A. § 7552 as used in this case . . . The very essence of land ownership is the certitude of ownership, in our society, [and] is derived from the rightful belief that one possesses all of the valid credentials, all obtained in the proper manner . . . and is protected by the Fourteenth Amendment of the Constitution.[3]

The second Question Presented, same as above, was raised at the trial (in essence), and in the motions for new trial.[4] The federal question raised at the trial (T.T. 176,11-15)[5] came in objecting to the deprivation of belief in ownership, but is more explicitly raised in the Amendment to the Motion for New Trial as follows:

> The Defendant asks the court of what other criteria (all possible owner credentials had just been recited) is there that a prospective landowner must avail himself, in order to ascertain just what his property is . . . There is

---

3. In motion sent to Law Court, January 23, 1993.

4. Federal questions raised for first time in motion for new trial is proper. *Chicago, B.& Q.R. Co. v. Chicago,* 166 U.S.226, 231-32 (1897).

5. References to the Trial Transcript are to be referred to herein as (T.T. page,line).

> no proper evidence at the trial to justify the court, *i.e.*, the State from depriving the Defendant of part of his land . . . The Fourteenth Amendment prevents the state from such deprivation . . . he was also penalized for exercising his right to protect his property.

In a motion to the Law Court concerning the suppression of the new evidence, the following federal question was raised, related to the first Question Presented.

> As to . . . the grievous assault on the due process clause of the Fourteenth Amendment of the Constitution, by the deliberate suppression of key evidence the Appellant respectfully requests the Law Court to return the file to Superior Court . . . It cannot be claimed that the Appellant had his hearing . . . when the COURT hears the conditions of that hearing . . . as to shock the sense of fairness the Fourteenth Amendment was intended to satisfy.[6]

The Law Court's response to the motion, January 23, 1993, containing the two federal questions, was it "shall be considered in conjunction with the merits of the appeal." (17a).

B. The Facts

A letter from Paul Knudson, former owner of petitioner's property, was presented to the post-trial hearing.[7] The letter stated that the respondent asked the Knudsons for permission to fill in the

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6. In motion sent to Law Court, January 23, 1993.

7. Post-trial transcript, pages 18-20.

ravine (or gully), that naturally divided the two properties in question and which contained allegedly the separating boundary. Not receiving permission from Paul Knudson, it was received from the petitioner. The respondent alleged that he did not ask for permission, since he had assumed that he owned the entire ravine. After the gully was filled in, the respondent started to treat the land beyond the gully, on the petitioner's side, as his own.

> After I had the property filled in, I started putting trees and bushes and flowers in and he came down, and he said to me, he said, I think that you're a little bit too far over on my land . . . .

[Respondent - (T.T. 159,24)].

The petitioner alleged that the plantings were spruce seedlings transplanted from the area, and cost the respondent nothing. The petitioner removed the seedlings because the respondent was attempting adverse possession.

The respondent brought suit asking for treble damages for $790 damage, attorney fees, court costs, surveyor fees, and cost of the suit, and at the same time asked the judge to declare where the line shall be. The respondent went to trial claiming this case was a land dispute. The petitioner went to trial claiming this case was a case of fraud, and pleaded fraud as an affirmative defense.

1. "The record shows that case objective was achieved"

Earl A. Bonsey, original owner of respondent's property, from 1966 to 1983, testified that he set the original stake in the ravine. After selling the property to respondent in 1983, Bonsey returned to the property in 1988, after the ravine was filled in, (covering the original stake) to set a duplicate stake of the original. Bonsey

testified that the stake set in 1966, was so close to the outhouse, that it was difficult to pass between the two.

Jake Leighton, witness for the respondent, testified that before he moved the outhouse in 1985 (1986?) in order to fill in the ravine, said that the outhouse was precisely on the same spot that Bonsey had placed the duplicate stake in 1988.[8] The petitioner pointed out to the Law Court, that Jake Leighton had just validated the Bonsey duplicate stake as being in approximately the same spot as the original separating stake. Bonsey had emphasized at the trial that the duplicate stake was approximate.

The judge dismissed the duplicate stake because Bonsey had to be mistaken since how could the original stake be under the courthouse?!

> I find Mr. Leighton's recollection that the outhouse was formerly located in the place where Mr. Bonsey believed, years later, that the stake marking the corner of his property had been, and I conclude that Mr. Bonsey is mistaken . . . .

(T.T. 198,18-22).

Midway into the trial, the petitioner was instructed to stop his defense of the deeds.

> THE COURT: Let me just — let me just put this question to rest.
>
> I have read the deeds. And I find that they are ambiguous, and I think that anyone who's

---

8. (T.T. 133,23 to 134,5).

> going to interpret these deeds is going to have to resort to parol evidence. So I have made that ruling. Now let's —
>
> MR. DICICCO: I'm glad you told me, your Honor, because there is no —
>
> THE COURT: *Let's not takes this any further.*
>
> MR. DICICCO: There is no sense kicking the dead horse. I just —
>
> THE COURT: There is no way —

2. *"substituting an alien boundary and then bestowing a tent ambiguity"*

The most graphic example of how ambiguities resulting from substituting the alien boundary, the "high water mark,"[9] to replace the deed's literal "a low water mark," (18a) was shown by the one example that the Law Court portrayed in its decision. (5a). The Law Court describes how Tremblay's surveyor started a ten rod measurement from the "high water mark" (considered by the court to be the western boundary) and ended up "in a third lot" over the eastern boundary. The petitioner had told the Law Court in detail, in the appeal, that if the surveyor had started the ten rod measurement from the "low water mark" as the deed directs, the measurement comes precisely to the eastern boundary.

3. *"the north border of Richardson . . . makes claim of latent ambiguity a physical impossibility"*

The north border of Richardson, (abutting landowner) on the survey map, respondent's exhibit #1, was identified by the only

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9. See "high water mark" on Judgment (12a).

surveyor to be coincident with the existing south border of the petitioner on the ground. (10a).

> Q. So the stones are here [stones forming an angle at the intersection of east border and south border of petitioner] and this part of the angle, this ray of the angle extended, goes in line with this fence that's between myself and Mr. Richardson and to the well indicated in the deeds? [DiCicco]
>
> A. That's approximated. And it's such a short line that you — [surveyor]

(T.T. 92,21).

The "short line" is the north border of Richardson that is point S to point W on the survey map. (10a). The point named by the misnomer (point E) is on the old Eben E. Church line, (line EX) which used to be the south border for the original tract of land before the partition into the properties of the litigants. The Church line was abandoned by the Lombardi deed, 1968, and the Richardson deed confirms the abandonment by literally identifying the new south border (line SW) to be coincident with the north border of Richardson, as the two borders do, in fact, so exist on the ground. In order to maintain the claim of latent ambiguity, the Church line has to be considered the south border of petitioner's property. But it also has to *become* the north border of Richardson's property also. The judge does not pass on the questions of fact and law that are involved, as to how the Richardson north line is to be removed.

The respondent maintained that the south border of the petitioner was still the same as it was before the partition, which is the Church line, but does not question the existence on the ground

of the new south border coinciding with Richardson's north border, both on the ground and on the survey map, exhibit #1.

The Richardson deed, while listed on the exhibit, was not handed into evidence by the surveyor, nor did the judge ask to see the Richardson deed.

4. "boundary that contradicted deeds and parol evidence"

The surveyor testified that "most people," (including previous owners of the properties in question) said that the separating boundary was in the ravine, and that if the ravine could be found, "we would probably not be here today."

Jake Leighton testified that the ravine was 18 to 20 feet from Tremblay's house. The Bonsey duplicate stake determines a boundary that is about 20 feet from Tremblay's house as can be seen on the survey map. The photograph of the edge of the ravine, petitioner's exhibit #1, shows the edge of the ravine to be a few feet from the side of Tremblay's house.

Jake Leighton testified, that in 1981, he saw a stake, that he considered to be the separating stake. (about 60 feet from the Bonsey duplicate stake, on the petitioner's side of the ravine). Jake Leighton also testified, that in 1985, he saw a stake, that he considered to be the separating stake (about 34 feet from the Bonsey duplicate stake, on the petitioner's side of the ravine). All three stakes lie on the eastern border of the properties in question.

The judge dismissed the first Leighton stake and chose between the Bonsey duplicate stake and the second Leighton stake, on the basis of precision. The judge decided that the second Leighton stake is the best choice because the "hole in the ground" that was found by the surveyor, was just nine inches away from the second Leighton stake.

> But I have heard Mr. Gerard's testimony that he can locate a stake in a place where a stake had previously been in a place nine inches from where Jake Leighton told him that there should be a stake because there had been a stake earlier in time over a period of years.

(T.T. 198,4-9).

> I conclude that Mr. Bonsey is mistaken, [outhouse would have been on top of the stake in 1966] and that Mr. Leighton's recollection is better as to the location of the stake [since the 2nd Leighton stake was just nine inches away from the hole in the ground] marking the southeast corner . . . .

(T.T. 198,21-25).

Since the second Leighton stake, (1985) came after the first Leighton stake, (1985) "over a period of years," was the time period from 1981.

The record shows that the only person to have ever seen the second Leighton stake is Jake Leighton. The only parole evidence other than the parol evidence in favor of the boundary in the ravine, were references to CES and Jake Leighton. CES was parole evidence for the first Leighton stake, and Jake Leighton either favored the first Leighton stake or the second Leighton stake, or he was implying that the first stake progressed to the second stake. The respondent himself, professed that he had not seen the second Leighton stake. The "survey report," which the surveyor said contained the parol evidence information, was not handed into evidence.

The distance from the Bonsey duplicate stake to the south border of the petitioner, is 189 feet, as it is listed in petitioner's deed. The distance from the second Leighton stake to the south border is 155 feet, which contradicts the petitioner's deed. The distance from the second Leighton stake to the Church line (considered to be the south border by the respondent), is, at most, 175 feet, which still contradicts the 189 feet listed in the deed.

C. Prior Proceedings

On August 6, 1990, respondent filed a lawsuit in District Court, Machias, Maine, seeking, under Title 14 MRSA § 7552, treble damages and costs for claimed damage. Respondent also asked the court to declare a separating boundary line.

The petitioner pleaded fraud, as an affirmative defense.

Judgment from Superior Court, Machias, Maine (jury-waived trial) issued on May 27, 1992. (11a).

A post-trial hearing was held on September 15, 1992, to hear the motions for new trial, containing new evidence on the fraud. An order was issued on May 24, 1992, supporting the charge of "wilful" trespass. (15a). The petitioner sent a motion to the Law Court reporting that the petitioner's attorney had disavowed the new evidence without the knowledge or consent of the petitioner. Request for help was denied. (26a).

Petitioner's appeal of the judgment to the Maine Supreme Judicial Court, Sitting as the Law Court, resulted in affirmance of the judgment on July 14, 1993. (1a).

Request for a hearing on the Law Court's decision and a question for clarification on exclusion of evidence was simultaneously denied with the mandate, on August 20, 1993. (27a).

REASONS FOR GRANTING THE WRIT

This case is important for review, because it graphically shows the inter-dependence between the appellate court and the lower court, and its inimical effect upon due process of law. The case shows several different strategies whereby due process of law can be thwarted by the inter-dependence between the two courts. The case demonstrates the need for legislation to encourage *true* independence between the appellate courts and the lower courts.

If the state appellate court, the Law Court, follows the lower court, in locked step, through every hurdle of violation of law, then how can there be the necessary ingredient of checks and balances that are so necessary in any kind of democratic system.

If the lower court gives a judgment built upon a series of breaches of law, and the Law Court, either follows, supplements, or corrects those flaws, thus accommodating the lower court, then the design will reveal itself, that the courts were not two independent bodies, following the dictates of their office, but rather; it was a communal undertaking with the function of the appellate to aid and abet the decision of the lower court, not according to law, but according to will.

1. Instructions concerning the evidence are clearly prejudicial where they put upon a party the burden of proving a material issue when the burden should be on the opposing party. [10]

The surveyor at the trial, substituted the "high water mark" for the western boundary, in place of the deed's literal "a low water mark," (18a), that is coincident with the northwest corner. The judge agreed with the surveyor, and placed the burden upon the petitioner to prove the deeds valid using the alien boundary,

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10. *Levin v. Northwestern Nat. Bank*, 154 Pa. Super. 94, 35 A.2d 769.

instead of putting the burden upon the surveyor to show that the deeds are invalid (as he claimed) by using the boundaries literally described in the deed. Midway into the trial, the judge instructed the petitioner to stop his defense of the deeds.

The Law Court follows the judge, agreeing that the surveyor should be listened to. Yet, it is on a common level of knowledge[11] that the "high water mark" is quite different from the "low water mark."

2. Judgments may be reversed for errors which substantially prejudice the [petitioner].[12]

The error of using an alien boundary to assess a latent ambiguity is so basic, that it is not written into law, but it is assumed, obviously, since any deed can be so invalidated. The judge also does not exhibit what the two or more possible configurations are supposed to be, nor was there any discussion at the trial of the necessary requirement[13] that there be created a necessity to choose between the configurations.

The Law Court supplies the deficiency by comparing the claimed latent ambiguity to a bona fide one in another case, as if the ambiguities were analogous.

3. When there is conflict in the evidence, the evidence erroneously excluded is prejudicial.[14]

The original surveyor and owner of respondent's property,

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11. Appellate courts are to judicially notice matters of common knowledge. *New York Indians v. United States,* 170 U.S. 1, 42 L. Ed. 927, 18 S. Ct. 531.

12. *Southern P. Co. v. Tomlinson,* 163 U.S. 369, 41 L. Ed. 193,16 S. Ct. 1171.

13. *Citizens' & Southern Nat. Bank v. Clark,* 158 S.E. 297, 300, 172.

Earl A. Bonsey, had testified that the original separating stake was within a few feet of the outhouse. Jake Leighton, who had filled in the ravine, testified that the outhouse was exactly on the same spot as the Bonsey duplicate stake. By a bit of logic, the Bonsey duplicate stake was validated as achieving the case objective. The judge dismissed this evidence as Bonsey must have been mistaken, since how could the original separating~ stake have been under the outhouse?!

The Law Court never refers to this excluded evidence, which shows that the case objective was achieved. The Law Court corrects the contradiction inherent in the exclusion, by questioning credibility of a witness (6a), but gives no further explanation. The Law Court's suggestion does not come from the record.

4. There are only two ways a fact can be changed in the record by the appellate court.[15]

The location of Richardson's north border was established at the trial, both on the map and on the ground by respondent's surveyor. That location made the claimed latent ambiguity a physical impossibility.

The Law Court eliminated the physical impossibility, at least on the map, by simply erasing it. Nothing could be done about the existence of Richardson's north border on the ground, except to simply ignore it. The Law Court changed the fact in record of the location of Richardson's north border on the map. But this is not one of the two ways of changing a fact in the record that is allowed to an appellate court.

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14. *Crawford v. United States*, 212 U.S. 183, 53 L. Ed. 465, 29 S. Ct. 260.

15. *Martinton v. Fairbanks*, 112 U.S. 670, 28 L. Ed. 862, 5 S. Ct. 321.

There are more examples that should be studied, such as the fact that the second Leighton stake rests solely on the word of Jake Leighton, with no networking of corroborating evidence in the record. This "evidentiary base" was made possible by the the fact that the petitioner, not testifying at the trial, was denied to testify at the post-trial, together with the suppressed new evidence of fraud. The court maintained that the case was a "land dispute" and the petitioner's pleading of fraud, as an affirmative defense, was sidelined.

CONCLUSION

The unity of action between the appellate and the lower court is the very thing by which both courts can bring everyone under its power. It was the will of the judiciary that the guy from New York was to lose the case, and the court had the power to make every lawyer accede to its will.

The New Yorker retained a lawyer in Maine for over the first year of the case. Then, with one month remaining before a scheduled trial date, the petitioner is told that the plans are changed, and that the lawyer was not going to sue for fraud, but was to present the case just as the respondent wanted it, *i.e.*, a "land dispute." The only witness was to be Jake Leighton, the alleged collaborator in the fraud. When the petitioner tried again retaining a lawyer, she disavowed the new evidence on fraud. (19a). When the notice for the hearing arrived at her office on or about August 5, 1992, she went on a 3-week vacation, and the petitioner finds out about the hearing with about two weeks left, in which he is supposed to get all his witnesses together. (21a). There is much more to this case. (22a-25a). If the Supreme Court of the United States is really sincere in its resolve to protect our constitution, then let it be resolved that something be done concerning the power of the lower court being linked with the appellate court. A study of

my case will show just how these two courts are linked, and the power they have over the lawyers.

Respectfully submitted,

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Dated: December 17, 1993

APPENDIX A — JUDGMENT OF THE MAINE SUPREME JUDICIAL COURT, SITTING AS THE LAW COURT, FOR THE FIRST CIRCUIT FILED JULY 14, 1993

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 6587
Law Docket No. Was-92-322

ROBERT P. TREMBLAY

v.

JOSEPH P. DICICCO

Submitted on briefs April 27, 1993

Decided July 14, 1993

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, COLLINS, RUDMAN, and DANA, JJ.

COLLINS, J.

Joseph P. DiCicco appeals from the judgment in favor of Robert P. Tremblay, entered in the Superior Court (Washington County, Smith. J.), after a jury-waived trial, in a boundary dispute between the parties. DiCicco asserts that the trial court clearly erred in interpreting the deeds in question and challenges the trial court's finding that he "willfully" destroyed plants, shrubs, and trees located on Tremblay's property in violation of 14 M.R.S.A. § 7552 (Supp. 1992). We affirm the judgment.

The two parcels of land in question were conveyed, as a single parcel, to Amos Webb in 1957. Webb divided the property and conveyed the northerly portion to Tremblay's predecessor by a deed, recorded in 1967, that described the parcel as follows:

Appendix A

> Commencing at low water mark in Dolley's Head Cove at the Southwest corner of land of Raleigh A. Whalen; thence Southerly by low water mark to a point seventy-five feet in a straight line from the point of beginning; thence Easterly in a straight line to the Southwest corner of land of Walter A. Smith; thence Northerly by the West line of said Smith land to the Southern line of said Whalen land; thence Westerly by said Whalen land to point of beginning.

The remainder of the Webb lot was conveyed to DiCicco's predecessors by a deed, recorded in 1968, describing the parcel as follows:

> Commencing at a spring in Dolley's Head Cove; thence proceeding in a generally northerly direction by and with low water mark a distance of one hundred eighty-nine feet (189'), more or less, to the southwesterly corner of [the Tremblay lot]; thence proceeding in a generally easterly direction, by and with the southerly line of [the Tremblay lot] a distance of ten (10) rods, more or less; thence proceeding in a generally southerly direction parallel with the first mentioned bound a distance of one hundred eighty-nine feet (189'), more or less; thence proceeding in a generally westerly direction through the aforementioned spring to low water mark and the point of beginning.

Appendix A

Tremblay purchased the northern parcel in 1983 and DiCicco purchased the southern parcel in 1984. The dispute over the boundary between the Tremblay and DiCicco parcels did not anse until after the parties filled two gullies, which formerly marked the boundary. After the gullies were fllled, Tremblay planted trees, bushes, flowers, and plants in that area. DiCicco told Tremblay that this landscaping was partially on DiCicco's lot and Tremblay responded, "once a survey is completed, lf all that material is on your line, it is yours to do whatever you want to do with." Despite his knowledge that the boundary was in dispute, DiCicco tore up Tremblay's landscaplng and eventually replaced it with a vegetable garderl and a large wooden fence.

Tremblay brought an action requesting a declaratory judgment determining the location of the disputed boundary and requesting damages pursuant to 14 M.R.S.A. § 7552 (Supp. 1992) for DiCicco's willful destruction of plants, trees, and shrubs on Tremblay's property. Tremblay's surveyor was unable to deflnltively locate the boundary. DiCicco did not hire a surveyor.

The parties agreed on the location of the southwest corner of the Tremblay lot but disagreed on the location of the southeast corner of the lot. (*See* attached map). Tremblay introduced the testimony of James Leighton who identified the former location of a stake intended to mark the southeast corner of the Tremblay lot. (*See* point B on attached map). Leighton testified that he was familiar with the property because he was the person hired to fill the gullies and because he had plowed snow in the area. DiCicco introduced the testimony of the former owner of the Tremblay lot, Earl Bonsey, who testified that the southeast corner of the Tremblay lot was in a different location. (*See* point A on attached map). Bonsey admitted, however, that he had been on the property only twicel since he sold it to Tremblay in 1983 and that the

property looked significantly different from when he owned it, especially because the gullies had been filled.

The trial court concLuded that, "Mr. Bonsey was mistaken, and that Mr. Leighton's recollection is better as to the location of the stake, marking the southeast corner of the Bonsey or Tremblay lot." The court further found that DiCicco willfully entered Tremblay's property without license or permission and destroyed Tremblay's plants, shrubs, and trees which were valued at $790. Pursuant to 14 M.R.S.A. § 7552 (Supp. 1992), the trial court granted treble damages, attorney fees, court costs, and expert fees. The trial court denied DiCicco's motions for a new trial and for clarification. DlCicco filed a timely notice of appeal.

I.

Boundary Determination

What boundaries a deed refers to is a question of law but where those boundaries exist Oll the face of the earth is a question of fact. *Theriault v. Murray*, 588 A.2d 720, 721 (Me. 1991). When interpreting a deed, a court should first look for the controlling intent of the parties on the face of the deed. *Taylor v. Hanson*, 541 A.2d 155, 157 (Me. 1988). This intent may be unclear, however, if the deed contains a latent ambiguity. *Id.* A latent ambiguity is created in a deed "when, in applying the description to the ground, facts extrinsic to the document controvert or in some way render unclear the deed's apparently unambiguous terms." *Id.*

In the case now before us, the Tremblay deed is controlling because the Tremblay conveyance was first in time. The Tremblay deed describes the southeast corner of their lot as "the Southwest corner of land of Walter A. Smith." Tremblay's surveyor testified

that using this point as the southeast corner of the lot would extend the boundary of Tremblay's lot across property that both parties agree is part of DiCicco's lot. Because the deed's apparently unambiguous terms are rendered unclear when applied to the face of the earth, the Tremblay deed contains a latent ambiguit~. ~he DiCicco deed, which is junior to the Tremblay deed, does not resolve this ambiguity, despite DiCicco's contention to the contrary. DlCicco's deed describes his northeast corner~ as being ten rods east of his northwest corner along the southerly line of th~e Tremblay lot. Tremblay's surveyor testified that terminating the call ten rods from DiCicco's northwest corner would result in the corner being located in a third lot.[1]

When a deed contains a latent ambiguity, as here, the trial court must determine the grantor's intent from contemporaneous circumstances and standard rules of construction. *Taylor v. Hanson*, 541 A.2d at 157-58. The trial court established the southern boundary of the Tremblay lot relying on the testimony of James Leighton. "Because the location of monuments and boundaries are questions of fact, the trial court's flndings will not be disturbed on appeal unless they are clearly erroneous." *Ricci v. Godin*, 523 A.2d 589, 592 (Me. 1987) (citations omitted). A factual flnding is clearly erroneous only if there is no competent evidence in the record to support it. *Hamm v. Hamm*, 584 A.2d 59, 62 (Me.

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1. DiCicco challenges the assertion that locating his northeast comer ten rods from his northwest comer would place the corner in the third lot. Focussing on the language in his deed describing the eastern boundary of his lot as "parallel with the first mentioned bound [i.e., the shore]," DiCicco asserts that this language required the trial court to draw a straight line between the northwest corner of his lot to a point over the water and apply the ten-rod distance from this point over the water. This contention is meritless. First, the deed states that the eastern boundary is parallel with the shore and not vice-versa. Second. DiCicco admits that the western boundary of his lot is not a straight line extending out over the water, but runs "along the shore."

1990). The trial courtis decision to reject the testimony of Earl Bonsey in favor of that of James Leighton is clearly within the province of the trial court. *See Allen v. Hunter,* 505 A.2d 486, 487 (Me. 1986) ("It [isl within the province of the presiding justice in [a] jury-waived trial to evaluate the [witness's] credibility."). "We give due regard to the opportunity of the trial court to judge the credibility of the witnesses and weigh the evidence." *Gray v. Gray,* 609 A.2d 694, 697 (Me. 1992). The record supports the trial court's conclusion in this case. Bonsey had been on the property only twice since 1983 and, because the gullies had been filled, the property looked significantly different than it had in 1983. Leighton, on the other hand, had recently done substantial work on the property. The trial court's location of the southern boundary of the Tremblay lot, therefore was not clearly erroneous.

II.

Willful Conduct Pursuant to Section 7552

DiCicco further challenges the trial court's finding that he willfully destroyed plants, trees, and shrubs on Tremblay's property, pursuant to 14 M.R.S. § 7552 (Supp. 1992).[2] He asserts

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2. Section 7552 provides in relevant part:

> Whoever cuts down, destroys, injures or carries away any ornamental or fruit tree, . . . goods or property of any kind from land not that person's own, without license of the owner . . . is liable in damages to the owner in a civil action. If such an act or such acts are committed willfully or knowingly, the defendant is liable to the owner in treble damages and. in addition, for the cost of any professional services necessary for the determination of damages, for attorney's fees, and for court costs.

14 M.R.S.A. § 7552 (Supp. 1992).

that he was the owner of the property in question until the trial court "nullified" his deed and, therefore, his destruction of Tremblay's plants could not have been the willful destruction of property from land not his own. We disagree. " 'Willfully,' as used in section 7552 . . . is intended 'to embrace conduct on the part of the defendant which displays an utter and complete indifference to and disregard for the rights Or others.' " *Bonk v. McPherson*, 605 A.2d 74, 77 (Me. 1992) (quoting *Guilmet v. Galvin*, 597 A.2d 1348, 1349 (Me. 1991)). We have held that "[t]he determination by the trial court as to whether conduct is willful or knowing within the meaning of section 7552 is a question of fact and will not be set aside unless clearly erroneous." *Walsh v. Johnston*, 608 A.2d 776, 778 (Me. 1992). After reviewing the record, we conclude that the evidence supports the trial court's finding of willful conduct. DiCicco knew that the boundary between the parcels was in dispute and made no effort to determine the actual boundary before destroying the plants, trees, and shrubs located on Tremblay's property. *See Guilmet v. Galvin*, 597 A.2d at 1350 (upholding finding of willful conduct where defendants made some effort to determine boundary but did not hire surveyor, examine metes and bounds indicated in their deed. or contact plaintiffs or other neighbors to determine the actual boundary).

Tremblay urges that we impose sanctions against DiCicco pursuant to M.R. Civ. P. 76(f) for appealing the trial court's decision,[3] "We exercise the power to sanction pursuant to Rule

---

3. M.R Civ. P. 76(f) provides that:

> [If we determine] that an appeal . . . is frivolous or instituted primarily for the purpose of delay. it may award to the opposing parties or their counsel treble costs and reasonable expenses, including attorney's fees, caused by such action.

76(f) 'only in egregious cases.' " *Voignier v. Bittner*, 609 A.2d 709, 710 (Me. 1992) (quoting *Estate of Bonin*, 457 A.2d 1123, 1125 (Me. 1983)). We do not find this to be such an egregious case.

The entry is:

Judgment affirmed.

Appendix A

SURVEY MAP ATTACHED TO LAW DECISION

[Omitted Here But Submitted Separately As Lodging Appendix]

APPENDIX B — PETITIONER'S DIAGRAMS EXPLAINING THE ERASURE

[Omitted Here But Submitted Separately As Lodging Appendix]

APPENDIX C — JUDGMENT OF SUPERIOR COURT, MACHIAS, MAINE FILED MAY 27, 1992

STATE OF MAINE
WASHINGTON, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET #CV-90-119

Robert P. Tremblay

PLAINTIFF

vs.

Joseph P. DiCicco

DEFENDANT

ORDER

The above-entitled action having been tried before the Court on May 15, 1992.

Based on the findings and conclusions stated on the record:

1. The southern boundary line of the property described in a deed from Earle Bonsey to Robert P. Tremblay recorded July 20, 1983, in Book 1235, Page 188 and the northern boundary line of property of Joseph P. DiCicco described in a deed from Paul F. Knudson, Et Ux., recorded November 30, 1984, in Book 1304, Page 95 as shown on the survey plan of Julien C. Girard, RLS, dated December 21, 1988, and entitled Standard Boundary for Robert P. Tremblay, recorded in the Washington County Registry of Deeds on January 11, 1989 in Hanger 2, Slide 133, is a straight line depicted on said survey plan as a point on the eastern sideline of said properties adjacent to a point, which Jake Leighton reportedly saw a 3/4" solid rod on the ground and labeled on said plan as "see note 7"; thence

westerly through a found 1" by 1" oak stake depicted on the plan as "see note 4" to the high water mark of Gouldsboro Bay.

2. The court further finds that the Defendant did willfully enter upon the land of the Plaintiff without license or permission and destroyed the Plaintiff's plants, shrubs and trees, having a value of $790.00, for which a judgment shall be entered for the Plaintiff in treble damages in the amount of $2,370.00 together with attorneys fees in the amount of $3,052.25, together with costs of suit, and that execution shall issue therefor.

The Clerk shall enter on the docket: The Order dated May 27, 1992, is incorporated in the docket by reference. The entry is made in accordance with Maine Rules of Civil Procedure, Rule 79A at the specific direction of the Court.

Dated at Machias, Maine this 27th day of May, 1992.

s/ Jack O. Smith
Justice, Superior Court

Appendix C

STATE OF MAINE
WASHINGTON, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET #CV-90-119

Robert P. Tremblay

PLAINTIFF

vs.

Joseph P. DiCicco

DEFENDANT

BILL OF COSTS

Pursuant to Rule 54(e) and Title 14, §1502-B, the Plaintiff, by and through his attorney, Jeffrey Lovit, Esq., requests that the following costs be taxes against the Defendant, Joseph P. DiCicco:

1. Pursuant to 14, M.R.S.A. §1502-B, the following costs are requested:

   A. Filing Fee
      [14, M.R.S.A., §1502-B(4)] $ 50.00
   B. Service of Process Fees
      [14 M.R.S.A., §1502-B(2)] $ 19.77
   C. Attendance Fees Paid to Witnesses
      [14 M.R.S.A., §1502-B(3)] $ 29.80

2. Pursuant to 14, M.R.S.A., §1502-C, the following costs are requested:

   A. Expert witness fee and expenses
      [14, M.R.S.A., §1502-C(1)]
      Julian Girard, RLS $315.00

Appendix C

B. Costs of visual aids [14, M.R.S.A., §1502-C(3)]	
Copies of Deeds and Survey	$ 10.50
Total costs requested	$425.07

Dated at Milbridge, Maine this 20th day of May, 1992.

s/ Jeffrey Lovit
JEFFREY LOVIT
ATTORNEY FOR PLAINTIFF
P.O. BOX 236
MILBRIDGE, MAINE 04658
(207) 546-2366

APPENDIX D — ORDER FROM POST-TRIAL HEARING FOR NEW EVIDENCE ON FRAUD DATED SEPTEMBER 24, 1992

STATE OF MAINE
Washington, ss.

SUPERIOR COURT
Civil Action
Docket No. CV-90-119

ROBERT P. TREMBLAY,

Plaintiff

v.

JOSEPH P. DiCICCO,

Defendant

ORDER

Hearing was held in Ellsworth on September 17, 1992, on two motions filed by the Defendant in this action. Defendant was represented at this hearing by Sandra Collier, Esq., having previously appeared *pro se* at trial. Plaintiff appeared by Jeffrey Lovit, Esq.

At the hearing, the Court denied Defendant's motion for a new trial for reasons stated on the record.

Defendant's motion for clarification of a possible technical error was treated at hearing as a motion for reconsideration. Counsel were given an opportunity to file briefs on the question of damages and attorney fees.

After review, the Court concludes that the record supports a finding of willful conduct on the part of the Defendant. Defendant's motion for reconsideration is DENIED.

Appendix D

Dated: September 24, 1992

s/ Jack O. Smith
Jack O. Smith, Justice
Superior Court

APPENDIX E — LAW COURT'S RESPONSE TO THE FEDERAL QUESTIONS DATED FEBRUARY 3, 1993

STATE OF MAINE
WASHINGTON, ss

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Was-92-322

ROBERT P. TREMBLAY

vs.

JOSEPH P. DiCICCO

ORDER

Upon appellant's motion entitled "presenting a question of constitutionality and a request for a hearing",

It is ORDERED that this motion shall be considered in conjunction with the merits of the appeal.

Dated: February 3, 1993

For the Court,

s/ David Robert
Associate Justice

APPENDIX F — RESPONDENT'S EXHIBIT NUMBER 9 — DEED

Dock 1235 Page 188

I, EARL BONSEY of Dover-Foxcroft, Piscataquis County, Maine, for consideration paid, grant to ROBERT P. TREMBLAY (whose mailing address is Chase Road, Veazie, Maine 04401) of Veazie, Penobscot County, Maine, with Warranty Covenants the land in Steuben, Washington County, State of Maine.

A certain lot or parcel of land situated at Dolley's Head, so-called, in Steuben in the County of Washington in said State, and bounded and described as follows, viz: Commencing at a low water mark in Dolley's Head Cove at the Southwest corner of land of Raleigh A. Whalen; thence Southerly by low water mark to a point seventy-five feet in a straight line from the point of beginning; thence Easterly in a straight line to the Southwest corner of land of Walter A. Smith; thence Northerly by the West line of said Smith land to the Southern line of said Whalen land; thence Westerly by said Whalen land to point of beginning.

* * * *

APPENDIX G — EXCERPT FROM MOTION REPORTING THE SUPPRESSION OF EVIDENCE

All of the following is taken from the motion, APPELLANT PRESENTING A QUESTION ON CONSTITUTIONALITY AND A REQUEST FOR A HEARING, Jan. 23, 1993, and is presented here as part of the framing of the federal question that is being raised in this petition. The motion was sent to LAW COURT.

On page one, [of the post-trial transcript] the COURT asks the attorney for the Appellant, [petitioner] "Exactly, what is it that is being stressed here?" The answer was the start of a deliberate suppression of the new evidence. On page 18,

> THE COURT: Well, the new evidence that you want to introduce would be the testimony of Mr. DiCicco?
>
> MS. COLLIER: PRIMARILY THAT, YES.

The new evidence has absolutely NOTHING to do with Mr. DiCicco. It is a total betrayal. In spite of the emphasis given to Earl A. Bonsey and documentation, prior to the hearing, and in spite of the fact that the Defendant/Appellant gave Ms. Collier two review sheets just prior to the hearing, the Appellant is betrayed as can be seen on page 24,

> THE COURT: . . . We have Mr. Bonsey here, but the most important of your new evidence would be the testimony of the defendant.

There is but one more door that has to be closed on the new evidence and that is to determine whether or not when the Appellee did write the deed when he purchased his property, did he

"knowingly" perpetuate the error into the deed. The COURT asks, on page 20:

> THE COURT: And was the deed in the description — was the description in the deed from Bonsey to Tremblay any different from the description in the deed from whoever to Bonsey?
>
> MS. COLLIER: I don't think so, Your Honor. No, there is no difference.
>
> But ... the deeds were NOT MERELY COPIED!

The newly acquired evidence of the Appellant which should have changed the whole case around, is eliminated on the basis of two false answers to just two essential questions. Perceptive inquiry and thorough inquiry could have avoided the false answers.

[There is much more detail in the motion as to how the new evidence was suppressed, but the essential part is given above.]

APPENDIX H — EXCERPT FROM MOTION REPORTING DIFFICULTY FINDING COUNSEL

The following is taken from the motion, DEFENDANT REQUESTING OF THE LAW COURT PERMISSION TO OBTAIN TESTIMONY, Nov. 1992, and is presented here as part of the framing of the federal question that is being raised in this petition. The motion was sent to LAW COURT.

The Defendant retained Ms. Collier after the trial. She felt that the judgment from the trial was incorrect and told the Defendant she would try to overturn the judgment. When Jeffrey Lovit [respondent's attorney] called Ms. Collier by phone, she related the following words from that conversation:

> "WHY ARE YOU TAKING THE CASE? . . .
> WHY ARE YOU TAKING THE CASE? . . .
> WHY ARE YOU TAKING THE CASE FOR HIM?"

These questions with their implied innuendo were repeated throughout the phone call, with that constant theme that the Defendant was some sort of untouchable and that everyone, including attorneys should align themselves against this "outsider." (The "outsider" is mine but is placed here to convey the sense of the conversation as conveyed to me.)

While Ms. Collier was sincere in the beginning, the pressures that were brought to bear upon her proved too great. Notice for the post-trial hearing came to her office on August 5, 1992, and Ms. Collier went on a 3-week vacation. The petitioner did not know about the hearing till August 27, 1992, with the hearing to be held on May 15, 1992. The petitioner was lucky to get Earl A. Bonsey to the hearing. But Ms. Collier succeeded in suppressing the Knudson letter by changing their answers around, and then

expected the Knudsons to return an affidavit. The Knudsons refused.

The petitioner had an attorney for over the first year of the case, but pressures also got to this attorney, and one month before a scheduled trial date, the petitioner was informed that there was a change in plans, and that Jake Leighton, the alleged collaborator in the fraud of the respondent, would be the only witness for the petitioner, and that there would be not one, but two surveyors, as witnesses. The petitioner went to trial pro se, and made the terrible blunder of not thinking of testifying at the end of trial.

An example of the abuse at the trial.

(T.T. 142,23 to 145,16)

Q. All right. And is there a meter above ground to indicate to us whether that pump is working or not? [Petitioner]

A. No, I don't believe so. [JAKE LEIGHTON]

Q. So how does someone — some owner, like myself, know whether or not that pump is working?

MR. LOVIT: Your Honor —

THE COURT: I presume — I presume that this must have something to do with this boundary line question.

MR. DICICCO: Your Honor, does not fraud involve — involved in this case?

Appendix H

THE COURT: What?

MR. DICICCO: Isn't fraud involved in this case?

THE COURT: I haven't heard any evidence at all of fraud so far?

MR. DICICCO: Well, your Honor, I'm — this is connected to the fraud. This is connected to the fraud.

THE COURT: On a boundary line?

MR. DICICCO: No, I'm trying to show — all right, I'll jump to my next question. Ad then we'll come back to this.

THE COURT: Well, why don't you tell me what you're trying to show, first of all.

MR. DICICCO: ALL RIGHT. I will by my next question.

THE COURT: No, I want you to tell me what you're trying to show.

MR. DICICCO: I'm trying to show that Mr. Leighton is a knowing or unknowing participant in this fraud, that is what I'm trying to show. He is a knowing or unknowing participant in this fraud. There was a boundary line between two neighbors, and they swear

approximately where the boundary line is there. The plaintiff fills in the gully, Mr. Leighton is the contractor, and I'm trying to prove a very difficult thing —

THE COURT: Yes, you are. And you must —

MR. DICICCO: . . . and if I'm not allowed to ask these questions, which do have a bearing, then in fact, I think I would just cut short my defense because I think it will be impossible for me to prove my case, because it is very difficult to prove a metaphysical thing. It's very hidden, but if I can prove things that are not natural and that have a design put — put together, they show a very clear thing, that that boundary line is where it was from 1972 to 1983, and still to today.

THE COURT: Well, all right. Thank you. I would rule that even though you feel that there's some evidence of fraud here, that there is no way at all that the pump or a monitor for a pump for a septic system can be in any way relevant to the location of this boundary line, unless the pump is located on the boundary line, or unless there's some relationship shown between the pump and the boundary line.

MR. DICICCO: . . . what I was trying to show [was] a turn of mind. What I'm trying to show —

Appendix H

THE COURT: Well, he was — he's just told you that he was working for the town of Steuben, and is the Town of Steuben a member of this conspiracy?

MR. DICICCO: I did not intend to make this big.

THE WITNESS: Can I say something?

THE COURT: No. I think WE'LL wait for the next question.

[The above is but a representative example from trial.]

APPENDIX I — LAW COURT'S ORDER GIVING REASON FOR DENIAL FOR RETURN OF FILE DATED DECEMBER 12, 1992

STATE OF MAINE
WASHINGTON, ss

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Was-92-322

ROBERT P. TREMBLAY

vs.

JOSEPH P. DiCICCO

ORDER

Upon motions of appellant for permission to file an additional brief and requesting reasons for the denial of his motion to obtain testimony,

The appellant may file a reply brief within 14 days of the service of the brief of the appellee and he may discuss the issues he seeks to address in his "additional" brief in said reply brief.

Appellant's motion to obtain testimony was denied because the Law Court's review of Superior Court decisions is limited to the documentary and testimonial evidence presented in the Superior Court.

Dated: December 16, 1992

For the Court,
s/ David Robert
Associate Justice

APPENDIX J — LAW COURT'S DENIAL FOR REHEARING DATED AUGUST 20, 1993

STATE OF MAINE

SUPREME JUDICIAL COURT

Sitting as the Law Court

DOCKET NO. WAS-92-322

ROBERT P. TREMBLAY

Appellee

v.

JOSEPH P. DiCICCO

Appellant

ORDER

Upon motion of the appellant, Joseph P. DiCicco, for reconsideration, it is ORDERED that the motion be and it hereby is DENIED.

It is FURTHER ORDERED that the mandate shall issue forthwith.

Dated: *August 20, 1993*

FOR THE COURT:

s/ Samuel W. Collins, Jr.
Samuel W. Collins, Jr., Associate Justice

APPENDIX K — THE COURT'S EXTENSION OF TIME TO DECEMBER 18, 1993

Supreme Court of the United States

No. A-395

Joseph P. DiCicco,

Petitioner

v.

Robert P. Tremblay

ORDER

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 18, 1993.

s/ D.H. Souter
Associate Justice of the Supreme
Court of the United States

Dated this 5th
day of November, 1993